



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

YALE LAW JOURNAL

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 35 CENTS.

EDITORIAL BOARD

PAUL ROBINSON BARTLETT, *Chairman*

JOHN W. LOWRANCE,
Business Manager

HIRAM STEELMAN,
Secretary

HERSCHEL W. ARANT,
BENTON BAKER,
PHILIP B. BUZZELL,
JOHN F. COLLINS,
HOWARD W. CURTIS,
CARROLL C. HINCKS,

ALBERT J. HARNO,
WILLIAM F. HEALEY,
GEORGE R. JACKSON,
VINCENT L. KEATING,
CLAUDE B. MAXFIELD,
GEORGE F. TURNER.

BUCKINGHAM P. MERRIMAN.

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Drawer Q, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

IS TENDER OF PART PAYMENTS RECEIVED BY THE SELLER UNDER A
CONTRACT OF CONDITIONAL SALE A CONDITION PRECEDENT
TO THE MAINTENANCE OF REPLEVIN BY THE
SELLER AFTER DEFAULT BY THE BUYER.

In the recent case of *Raymond Co. v. Kahn*, 145 N. W., 164 (Minn.), it was held: that, in a so-called conditional sale, where the seller retained title to the property and the right to recover it on default of the buyer, it is not, in case of such default, a condition precedent to the maintenance of replevin by the seller that he return to the buyer partial payments made or notes given for installments. (Whether partial payments made by the buyer are forfeited in such case was left undecided.)

It is a general rule in the case of an ordinary *contract of sale* that an election to sue on the contract upon breach is a waiver by the seller of the right to rescind,¹ and likewise that a seller cannot *rescind* the contract and retain the proceeds of the sale, but as a condition precedent to rescission he must restore or offer to restore that which he has received as consideration under the

¹ *Foster v. Smith*, 56 Ill., 209; *Kinney v. Kiernan*, 49 N. Y., 164; *Hart v. Haight*, 10 N. Y. Supp., 798; *Tufts v. Weinfeld*, 88 Wis., 647; *Harrison v. Ricketts*, 63 L. J. Q. B., 647; 71 L. T. Rep. (n. s.), 191.

contract.² Also it may be noticed that mere default by the buyer as to payment, after delivery of the goods, will not give the seller a right to rescind,³ nor can he retake or replevy the goods.⁴

In a so-called "conditional" sale (more accurately it is a contract to sell, accompanied by a bailment of the goods, with a right to retake them upon default by the buyer) we have a transaction of a very different kind from a contract of sale. Title is reserved in the seller,⁵ and there is a right to pursue the goods in specie upon mere default.⁶ The seller then has a right of possession and may retake the goods,⁷ or replevy them.⁸ The exercising of this right by the seller has been held an election to rescind,⁹ and, if so, held, he cannot thereafter sue for the purchase price.¹⁰

This is indeed true if there be rescission, as such, for all rights under the contract are thereby terminated;¹¹ yet it is evident that the seller may also reclaim the property without rescinding the contract but merely for the purpose of enhancing his security for the purchase price.¹² By so doing it may be that no rescission is

² *Wilcox v. San Jose Fruit Packing Co.*, 113 Ala., 19; *Miller v. Steen*, 30 Cal., 402; *Doane v. Lockwood*, 115 Ill., 490; *Thompson v. Peck*, 115 Ind., 52; *Milliken v. Skillings*, 89 Me., 180; *Sears v. Ames*, 413; *Smith v. Ryan*, 191 N. Y., 452; see *Willis on Sales*, sec. 567; *Mechem on Sales*, p. 774.

³ *Martindale v. Smith*, 1 Q. B., 395; *Buckingham v. Osborne*, 44 Conn., 133; *Morse v. Chicago R. R.*, 73 Iowa, 226; *Skinner v. Michigan Hoop Co.*, 119 Mich., 412.

⁴ *McNail v. Zeigler*, 68 Ill., 224; *McGraw v. Gilmore*, 83 N. C., 162; *Dickens v. Winters*, 169 Pa. St., 126.

⁵ *Roberts v. Norton*, 66 Conn., 1; *Smith v. Vaughn*, 82 Ga., 574; *Nichols v. Ashton*, 155 Mass., 205; *American Harrow Co. v. Deyo*, 134 Mich., 639.

⁶ *Fields v. Williams*, 91 Ala., 502; *Van Allen v. Francis*, 123 Cal., 474; *Barton v. Groesclose*, 11 Ida., 227; *Black Diamond Coal Co. v. The H. C. Grady*, 87 Fed., 232.

⁷ *Davis v. Millings*, 141 Ala., 378; *Griffin v. Ferris*, 76 Conn., 221; *Pels v. Miller*, 192 Mass., 13; *Roach v. Curtis*, 115 N. Y. App. Div., 765; *Seanor v. McLaughlin*, 165 Pa. St., 150; *Segrist v. Crabtree*, 131 U. S., 287.

⁸ *Lambert v. McCloud*, 63 Cal., 162; *Frisch v. Wells*, 200 Mass., 129; *Buffkins v. Eason*, 112 N. C., 162; *Scotch Mfg. Co. v. Carr*, 53 Fla., 480.

⁹ *Lamond v. Duvall*, 9 Q. B., 1030; *Dowdell v. Empire Fur Co.*, 84 Ala., 316; *Tufts v. Brace*, 103 Wis., 341; *Perkins v. Gobbem*, 116 Mich., 122.

¹⁰ *Loomis v. Bragg*, 50 Conn., 228; *Turk v. Carnahan*, 125 Ind. App., 125; *Edmead v. Anderson*, 118 N. Y. App. Div., 309.

¹¹ See *Mechem on Sales*, p. 504.

¹² *Willis on Sales*, pp. 962 ff.; *Miller v. Steen*, *supra*; *Tufts v. D'Arcambal*, 85 Mich., 185; *Latham v. Summer*, 89 Ill., 233; *White v. Gray's Sons*, 96 N. Y. App. Div., 154; *Ames v. Moir*, 130 Ill., 582.

accomplished. The seller simply enforces a right specifically reserved to him under the contract. How can he be said to rescind the contract when he is acting under it? The agreement is still in force. The buyer may still obtain the goods by paying the price. There is only this difference in the situation: before the seller became repossessed of the goods, he had, after default, a right of action plus a right to retake, now he has a right of action plus a right to foreclose what is in reality a mortgage on the goods. Now it would seem clear in such a case that the part payments need not be tendered back, for if the seller still has a right of action for the contract price, he must of necessity be entitled to keep that part of the contract price which he has received, at least, until he has obtained satisfaction in one way or another.

The Courts, however, differ on this question greatly. If there be true rescission it would seem a hardship, all rights under the contract being gone,¹³ that the vendee should forfeit his payments, as in a case where he had paid \$90 on a chattel of an agreed valuation of \$100.

Again, if the seller is required to tender all payments back he will have no compensation for the use of the property. However this may be, even in the case of reclamation there is also conflict. Many jurisdictions regard the payments as forfeited,¹⁴ and there is consequently no need of tender.¹⁵ Others take the opposite view and consider tender of part payments an absolute condition precedent to the maintenance of replevin.¹⁶

Certain cases frequently cited to support this latter holding are clearly distinguishable. For instance, in *Soda Fountain Co. v. Drug Co.*¹⁷ the seller himself was in default. *Shafer v. Russell*¹⁸

¹³ *Madison R. R. Co. v. Osler*, 39 Mont., 245.

¹⁴ *Fields v. Williams*, *supra*; *Hayes v. Temple*, 198 Mass., 372; *Latham v. Sumner*, *supra*; *Ryan v. Wayson*, 108 Mich., 519; *Hughes v. Kelly*, 40 Conn., 148; *Lorain Steel Co. v. Norfolk St. Ry. Co.*, 167 Mass., 500; *White v. Oakes*, 88 Me., 367; *Tufts v. D'Arcambal*, *supra*; *Duke v. Shackelford*, 56 Miss., 552; *Angier v. Mfg. Co.*, 1 Gray, 621; *Haynes v. Hart*, 42 Barb., 58; *Morgan v. Kidder*, 55 Vt., 367; *Kirby v. Thompkins*, 48 Ark., 273.

¹⁵ *Latham v. Sumner*, *supra*; *Wall v. Demitkiewicz*, 9 App. Cas. D. C., 109; *Nat'l Cash Reg. Co. v. Ferguson*, 25 Misc., 363.

¹⁶ *Commercial Co. v. Campbell Co.*, 111 Ga., 388; *Puffer v. Lucas*, 112 N. C., 377; *Spyer v. Baker*, 59 Ohio St., 11; *Preston v. Whitney*, 23 Mich., 260; *Hamilton v. Singer Mfg. Co.*, 54 Ill., 371; *Segrist v. Crabtree*, *supra*.

¹⁷ 136 Iowa, 312.

¹⁸ 28 Utah, 444.

simply held that the payments were not forfeited but said nothing about tender as a condition precedent to replevin. *Hine v. Roberts* decided that goods given in part payment *were* forfeited but held that the seller, having reclaimed his property, could not thereafter sue on a note previously given him.

It may also be noticed that in *Segrist v. Crabtree*,²⁰ the leading case in opposition to the majority rule, the opinion cites no cases in support of the view therein advanced and dismisses the matter in a few words.

In *Latham v. Davis*²¹ the Court evidently treated the contract as rescinded though the seller only reclaimed.

The hardship of forfeiture has led some Courts to declare that where the seller has reclaimed there is failure of consideration, and part payments may be recovered back with a fair deduction for compensation for the use of the property.²² This, even, is distinctly unfair to the seller, for, as has been shown, he is entitled to have the contract treated as still in *esse*, and recover the contract price; in which case the goods will become the property of the buyer.

Yet another view is assumed in some few states, and this, it is submitted, is the correct one. There it is held, in accord with the principal case, that whether payments be regarded as forfeited or not and irrespective of whether the buyer may have a right, if the seller is otherwise satisfied, to recover them in the future, that tender is no condition precedent to retaking the goods or to the maintenance of replevin.²³

On principle the buyer in a conditional sale, though he never receives the goods through his own default, has got all he was promised, that is, a conditional right, and were it not for the fact that equity abhors a forfeiture he would most certainly be deprived of his part payments.²⁴

This equitable principle, however, should not be used to strip the seller of his security. "The transaction" (a conditional sale) says a learned author, "is in its essence a chattel mortgage by the

¹⁹ 48 Conn., 267.

²⁰ *Supra*.

²¹ 44 Fed., 862.

²² *Hill v. Townsend*, 91 Ala., 286; *Pierce v. Staub*, 78 Conn., 359; *Latham v. Sumner*, *supra* (*semble*).

²³ *Fleck v. Warner*, 29 Kans., 492; *Thirlbey v. Rainbow*, 93 Mich., 164.

²⁴ *Williston on Sales*, p. 952, note.

buyer on the purchased property to secure the price. Just as the mortgagee may sue for the proceeds and also foreclose his mortgage on the property,²⁵ so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own, but for the purpose of foreclosing it * * * * Of course, as in the case of a mortgage, the seller should be restricted to satisfaction of his claim with interest * * * * Any excess over the amount due should be returned to the buyer."²⁶

Then why not treat a conditional sale as a chattel mortgage? The technical difficulty that title has never passed to the buyer is easily removed by a simple fiction, which does no more violence to the logic than those of equitable conversion or of lost grants in prescription. By this means justice will be done. The buyer is not prejudiced. He may sell the property subject to the mortgage²⁷ even after default²⁸ or he may redeem by paying the price.

On the other hand the seller is protected. If he recovers on the contract, well and good, for then the property will be the buyer's. If he forecloses, the excess over the mortgage debt with interest will be returned to the buyer and the debt itself satisfied²⁹ and if no return be made an action will lie to compel the mortgagee to account.³⁰

This view is necessarily conclusive as to the question of tender of part payments in replevin. The seller is entitled to his every lawful security. The fact that he has an action on the contract against a probably insolvent buyer would be small consolation to a seller who had been compelled to refund part payments lawfully received under that contract. It is submitted that the view of the principal case is correct.

CAN A TESTATOR'S ESTATE BE HELD LIABLE FOR A LIBEL CONTAINED IN HIS WILL?

In *Harris v. Nashville Trust Company*, decided recently by the Supreme Court of Tennessee, it was held that an action could be

²⁵ See *Toney v. Cook*, 116 Mass., 163; *Erickson v. Rafferty*, 79 Ill., 209.

²⁶ *Williston on Sales*, p. 952, note.

²⁷ *Wilkins v. French*, 20 Me., 111; *Bigelow v. Willson*, 1 Pick., 485; *Russel v. Ely*, 2 Black. (U. S.), 575.

²⁸ *Paulling v. Barron*, 32 Ala., 9.

²⁹ *Colorado Bank v. Wilson*, 16 Colo., 316; *Hoffman v. Wetherell*, 42 Iowa, 89; *Korns v. Shaffer*, 27 Md., 83.

³⁰ *McClendon v. Wells*, 20 S. C., 514; *Reese v. Lyon*, 20 S. C., 17.